

¹ R.H. Trans. at 7.

aggravation of her preexisting chemical sensitivity, respondent should be required to pay only those medical expenses associated with the temporary aggravation, but that if claimant sustained a permanent impairment, all of her medical bills associated with her accident should be paid by respondent. However, the parties also acknowledged there was insufficient evidence in the record to determine the amount of medical bills for which respondent should be responsible, if the Board determined claimant sustained only a temporary aggravation of her preexisting chemical sensitivity. The parties also indicated the record did not reflect which of claimant's medical bills were paid by respondent, claimant or remain unpaid.

ISSUES

In the July 27, 2009, Award, ALJ Klein found: (1) claimant experienced migraine headaches of a temporary nature as the result of her chemical exposure working for respondent, (2) the medical treatment claimant received before June 17, 2002 (which was the date that ALJ Jon L. Frobish terminated claimant's medical treatment),² was adequate to relieve claimant's temporary symptoms, (3) claimant did not sustain any permanent impairment, and (4) claimant failed to establish a need for ongoing or future medical treatment. Accordingly, the ALJ denied claimant's requests for permanent disability benefits, the payment of outstanding medical expense, and for additional medical benefits.

Claimant appealed the July 27, 2009, Award to the Board. In an April 30, 2010, Order, a majority of the Board³ modified the Award and granted claimant permanent total disability benefits and medical benefits, including past, future, ongoing and unauthorized medical benefits. Two members of the Board dissented, indicating claimant failed to prove anything beyond a temporary exacerbation of her ongoing and preexisting multiple conditions.

Respondent appealed the April 30, 2010, Order to the Kansas Court of Appeals. On September 9, 2011, the Court of Appeals reversed the Board's finding that claimant sustained a permanent total disability arising out of or caused by her employment at respondent from April 1997 to December 1998. The Court found the causation opinions based on *post hoc, ergo propter hoc* logic did not constitute substantial or competent evidence of causation of claimant's alleged permanent disability. The Court of Appeals remanded this case to the Board for further action consistent with the Court's opinion. Specifically, the Court of Appeals directed the Board to determine the amount of workers compensation benefits to which claimant may be entitled as a result of any aggravation of

² The Order by ALJ Frobish was actually dated June 20, 2002, but ALJ Klein referenced the date as June 17, 2002.

³ Since the Board's April 30, 2010, Order, four of five of the Board Members have changed, including all three of the Board Members in the majority.

her preexisting chemical sensitivity while employed by respondent. Claimant requested review by the Kansas Supreme Court. On June 13, 2012, the Supreme Court denied review of the Court of Appeals opinion.

Respondent maintains that based upon the ruling of the Kansas Court of Appeals in this case, it is clear that claimant did not suffer a permanent injury and that claimant is entitled only to medical benefits for no longer than 72 hours after her chemical exposure at respondent on December 8, 1998.

Claimant asserts the record establishes a causal relationship between her increased symptoms and her employment with respondent. In the alternative, claimant maintains her injuries could also be considered an occupational disease. Claimant requests the Board find she sustained a 100% whole body functional impairment and a 100% work disability. Claimant also requests payment of medical and hospital expenses incurred, future medical expenses, expenses incurred by claimant and treatment by Dr. Rea.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's disability?
2. What, if any, of claimant's medical bills should respondent be required to pay?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

The Board adopts and incorporates by reference the Factual and Procedural Background set forth in the Kansas Court of Appeals decision in *Chriestenson*.⁴ The Board also adopts and incorporates by reference Findings of Fact set forth by the Board in its Order dated April 30, 2010, to the extent that said Findings of Fact do not conflict with the aforementioned Factual and Procedural Background set forth in *Chriestenson*.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

⁴ *Chriestenson v. Russell Stover Candies*, 46 Kan. App. 2d 453, 263 P.3d 821 (2011), *rev. denied* (2012).

right depends.⁵ “Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁶ The existence, nature and extent of the disability of an injured workman is a question of fact.⁷ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability.

Dr. Grace E. Ziem determined claimant sustained a 100% whole person impairment under the *Guides*⁸ and opined claimant was unable to engage in any substantial and gainful employment. However, the Kansas Court of Appeals reversed the Board majority’s previous finding that claimant was permanently and totally disabled and remanded the case to the Board. The Kansas Court of Appeals criticized the opinions of Drs. Ziem and Richard L. Hull, stating:

In its Order, the majority of the Board candidly admits that it was “persuaded” by the testimony of Dr. Ziem in concluding that Chriestenson’s employment at Russell Stover in 1997 and 1998 caused her to be permanently and totally disabled. It appears from a review of the record that Dr. Ziem only saw Chriestenson in person on June 28, 2006, which was more than 7 years after Chriestenson’s employment at Russell Stover ended. On the same day, Dr. Ziem issued a report in which she diagnosed Chriestenson with toxic encephalopathy, peripheral neuropathy, and reactive upper and lower airway disease.

As the dissenting members of the Board pointed out, Dr. Ziem did not review Chriestenson’s prior medical records relating to her chemical sensitivity and neurological problems before rendering her causation opinion. In addition, Dr. Ziem admitted during her deposition testimony in this case that she did not have any information on the quantity of chemicals to which Chriestenson was exposed at Russell Stover. Moreover, when asked about other factors such as conditions in Chriestenson’s home and her smoking habit, Dr. Ziem stated that they were irrelevant. Likewise, when Chriestenson’s prior neurological conditions were brought to Dr. Ziem’s attention during her deposition, she stated that they were also irrelevant.

When Dr. Ziem was asked in her deposition about the level of exposure to chemicals at Russell Stover, she stated that the concentrations were high enough

⁵ K.S.A. 1998 Supp. 44-501(a).

⁶ K.S.A. 1998 Supp. 44-508(g).

⁷ *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

⁸ American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

to cause symptoms. Such reasoning is a classic example of *post hoc, ergo propter hoc* logic and is not helpful in establishing a causal connection between the alleged permanent disability and Chriestenson's employment at Russell Stover. Thus, although we do not question Dr. Ziem's ability to render opinions regarding Chriestenson's symptoms and diagnosis, we find that her causation opinion is not based on substantial evidence.⁹

. . . .

We have focused on the testimony of Dr. Ziem because the majority of the Board makes it clear that it relied upon her causation opinion. We note, however, that Dr. Richard Hull has rendered a similar opinion regarding causation. In reviewing his testimony, we find that Dr. Hull's causation opinion is also based on *post hoc, ergo propter hoc* logic and likewise does not constitute competent evidence of causation.¹⁰

At oral argument, claimant argued that the Kansas Court of Appeals found fault only with the causation opinions of Drs. Ziem and Hull, not their opinions on the nature and extent of claimant's disability. However, as pointed out by the Kansas Court of Appeals, Dr. Ziem did not have any information on the quantity of chemicals to which claimant was exposed at respondent, and deemed irrelevant the condition in claimant's home, her smoking habit, and her prior neurological conditions. Dr. Ziem did not see claimant until 2006, more than seven years after claimant's employment with respondent concluded. Dr. Ziem erroneously believed claimant was in relatively good health before beginning her employment with respondent.

As pointed out by the Dissent to the Board majority's April 30, 2010, Order:

Claimant's past medical history is significant in this matter. Her history of migraine headaches goes back to 1986 when she had new carpet installed in her home. Claimant suffered migraines for approximately a year after this incident and was treated by a neurologist and diagnosed with daily left hemicranial headaches, memory problems, paraphasic lapses and left temporal complex partial seizures. Additionally, claimant lost her license as a nurse in the mid-1980s due to the seizures. Dr. Ziem noted the seizures were not a problem when claimant began working for respondent. But, she was unaware that claimant was taking Dilantin for the seizures from the mid-1980s up to the time claimant began working for respondent. Dr. Ziem was unaware that claimant suffered tremors in her right arm in 1993 and was taking Inderal for those tremors. Claimant underwent a multitude of tests including a test for multiple sclerosis before beginning with respondent.

⁹ *Chriestenson*, 46 Kan. App. 2d at 461-462.

¹⁰ *Id.* at 463.

However, again, Dr. Ziem was unaware of this history as none of claimant's prior medical history was made available to her before the examination in 2006.¹¹

Dr. Ziem's opinion that claimant has a 100% whole person permanent functional impairment is unrealistic. Dr. Ziem's permanent functional impairment opinion did not take into consideration that claimant had chemical sensitivity and temporal headaches before she began working for respondent. Simply put, Dr. Ziem's opinion that claimant sustained a 100% whole person permanent functional impairment as the result of her exposure at respondent's plant is not credible.

Dr. Hull testified that he treated claimant for temporal headaches before, during and after the time she worked for respondent. He also testified that claimant had chemical sensitivity since the mid-1980s. Dr. Hull was of the opinion that claimant had increased headaches, muscle spasms, tremors, slurred speech and forgetfulness after being exposed to chemicals while working for respondent. He opined that claimant's chemical sensitivity with malaise, chronic fatigue and fibromyalgia were caused or permanently aggravated by her chemical exposure at respondent's plant. Dr. Hull did not provide an opinion on whether claimant had a preexisting permanent functional impairment before she began working for respondent. Nor did Dr. Hull give an opinion in accordance with the *Guides* as to the percentage of claimant's permanent functional impairment resulting from the chemical exposure while working for respondent. Dr. Hull, like Dr. Ziem, did not know the quantity of chemicals claimant was exposed to, nor the duration of the exposure.

The Board finds that the opinions of Dr. Jay S. Zwibelman are more credible than those of Drs. Ziem and Hull. Dr. Zwibelman, board-certified in psychiatry and neurology, found claimant's ongoing problems stemmed from preexisting conditions and claimant's long history of cigarette smoking. Additionally, Dr. Zwibelman had the opportunity to examine claimant in February 1999, shortly after claimant's employment with respondent ended. His report indicated claimant had an essentially normal neurological examination.

Dr. Zwibelman examined claimant a second time on November 15, 2001, and noted in his report that claimant did not have toxic encephalopathy or a positive Romberg's, did not have autonomic dysfunction and had no underlying tissue damage. Dr. Zwibelman indicated that a chemical exposure could potentially irritate the nose and sinuses to provoke more migraine headaches, but he could not anticipate that effect to last more than one week. He also opined that claimant's myofascial pain and headaches were unrelated to her chemical exposure. In a letter dated July 16, 2007, to respondent's attorney, Dr. Zwibelman stated:

¹¹ *Christenson v. Russell Stover Candies*, No. 247,036, 2010 WL 1918562 (Kan. WCAB Apr. 30, 2010), *appealed to the Kansas Court of Appeals* (*Christenson v. Russell Stover Candies*, 46 Kan. App. 2d 453, 263 P.3d 821 (2011), *rev. denied* (2012)).

In summary, I do not feel that there is a basis for the conclusions drawn by Dr. Grace Zeim *[sic]*. Her assertions to neurologic disease are simply false. There was no evidence for neuromuscular disease by electrophysiologic testing or by her neurologic examination. The ulnar neuropathy would be a focal pressure neuropathy and unrelated to any alleged exposure. There was no evidence for diffuse cerebral dysfunction."¹²

The Board finds that claimant, as a result of her chemical exposure while working for respondent, sustained a temporary aggravation of her preexisting chemical sensitivity lasting approximately one week after December 8, 1998, which was claimant's last known chemical exposure at work, and sustained no permanent functional impairment.

Medical benefits

The Workers Compensation Act provides, in part:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus, and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director in the director's discretion so orders, including transportation expenses . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury.¹³

The Board finds respondent is liable, subject to the fee schedule, for such medical treatment reasonably necessary to cure and relieve the effects of claimant's temporary aggravation from her chemical exposure. Dr. Zwibelman indicated the effects of claimant's chemical exposure would be expected to last no more than one week after her last chemical exposure. However, from the record, the Board cannot discern what medical expenses claimant incurred during the week following her exposure to the chemicals at work on December 8, 1998. Therefore, the issue is remanded to the ALJ to determine what medical expenses claimant incurred through the date of accident, December 18, 1998, that were reasonably necessary to cure and relieve the effects of her temporary aggravation from chemical exposure at work.

¹² Zwibelman Depo., Resp. Ex. F at 2.

¹³ K.S.A. 1998 Supp. 44-510(a).

CONCLUSION

1. Claimant sustained a personal injury by accident arising out of and in the course of her employment with respondent that resulted in a temporary aggravation of her preexisting chemical sensitivity. Claimant failed to prove that she sustained a permanent functional impairment as the result of her chemical exposure while working for respondent.

2. Respondent is liable, subject to the fee schedule, for medical expenses claimant incurred through December 18, 1998, that were reasonably necessary to cure and relieve the effects of her temporary aggravation from chemical exposure at work. This matter is remanded to the ALJ to determine claimant's related medical expenses incurred through December 18, 1998.

AWARD

WHEREFORE, the Board modifies the July 27, 2009, Award entered by ALJ Klein.

Claimant is not entitled to any temporary, permanent partial or permanent total disability payments.

Respondent is liable, subject to the fee schedule, for medical expenses claimant incurred through the date of accident, December 18, 1998, that were reasonably necessary to cure and relieve the effects of her temporary aggravation from chemical exposure at work. This matter is remanded to the ALJ to determine claimant's related medical expenses incurred through December 18, 1998.

Claimant is entitled to unauthorized medical benefits up to the statutory maximum.

The record does not contain a fee agreement between claimant and her attorney. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Division for review and approval. Accordingly, under K.S.A. 44-536(b), claimant's attorney is only entitled to such fee as is approved.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
wlp@wlphalen.com

Brenden W. Webb, Attorney for Respondent and its Insurance Carrier
bwebb@hdwlawfirm.com

Thomas Klein, Administrative Law Judge